

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re Flint Water Cases.

Judith E. Levy
United States District Judge

_____/

**ORDER REGARDING ISSUES DISCUSSED AT THE OCTOBER
25, 2017 STATUS CONFERENCE**

The Court held a status conference regarding its Flint water litigation on October 25, 2017. Pursuant to the discussion held at that conference, the Court orders as follows:

1. Defendants will submit a proposal regarding the appointment of liaison counsel or an executive committee for defendants on or before **November 1, 2017**. That proposal is to be submitted in Case No. 16-cv-10444.
2. Interim class counsel for plaintiffs and defense counsel are to meet and confer and file a report on Case No. 16-cv-10444 by no later than **November 13, 2017**, regarding the following issues:
 - a. The establishment of a common repository for documents produced in this Flint water litigation;

- b. The establishment of an Electronically Stored Information protocol;
 - c. A third-party preservation order; and
 - d. The provision of insurance disclosures by defendants.
 - e. The content of proposed fact sheets, the plaintiffs whom each side believes should have to complete the fact sheets, and a timeframe for distributing and completing the fact sheets.
3. Defendant Leo A. Daly and plaintiffs in all cases in which Leo A. Daly has been named will submit a stipulated order to the Court regarding the duration and content of limited jurisdictional discovery on or before **November 1, 2017**. The order is to identify every case in which Leo A. Daly has been named as a defendant, and will be entered on each of those cases.
4. Defendants asserting Fifth Amendment protections against participation in discovery will submit supplemental briefing regarding that issue on or before **November 9, 2017**. Interim class counsel will respond to that briefing on or before

November 20, 2017. Briefing is not to exceed twenty pages per brief, and will be submitted on Case No. 16-cv-10444.

5. Class plaintiffs will submit a properly captioned complaint with Nancy Peeler added as a named defendant by **October 27, 2017.**
6. In *Boler v. Earley*, the United States Court of Appeals for the Sixth Circuit determined that the State defendants did not waive their sovereign immunity despite arguably defending their case on the merits in federal court and participating and settlement negotiations. *Boler*, 865 F.3d 381, 410-411 (6th Cir. 2017). “The standard for finding Eleventh Amendment waiver is a stringent one.” *Id.* at 411 (citing *Vaqueria Tres Monjitas, Inc. v. Pagan*, 748 F.3d 21, 21 (1st Cir. 2014)). The Sixth Circuit contrasted the State defendants’ conduct with the conduct of the state of Tennessee in *Ku v. Tennessee*, where Tennessee waived sovereign immunity “by engaging in substantial discovery, filing a motion for summary judgment, and only raising an Eleventh Amendment defense after an

adverse ruling on the summary judgment motion.” *Id.* at 410 (citing *Ku*, 322 F.3d 431, 435 (6th Cir. 2003)).

The Court requests supplemental briefing from all defendants claiming the defense of sovereign immunity. That briefing should discuss the applicability of *Boler*, *Ku*, and any other relevant precedent on this issue, and whether providing already-produced documents in a case where those parties have previously asserted their immunity (*see, e.g.*, Dkt. 79) would serve to waive sovereign immunity. Briefing is not to exceed fifteen pages per defendant, is to be submitted on Case No. 16-cv-10444, and is due on or before **November 9, 2017**. Plaintiffs may respond no later than **November 20, 2017**, and their response, if any, shall be no longer than fifteen pages.

7. The Court will continue the October 25, 2017 hearing on **November 15, 2017 at 10:00 A.M.** in Courtroom 1 in Ann Arbor, Michigan. A revised agenda will be distributed in all

Flint water cases by **November 9, 2017**.

IT IS SO ORDERED.

Dated: October 27, 2017
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on October 27, 2017.

s/Shawna Burns
SHAWNA BURNS
Case Manager